

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'C' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं श्री एस जयरामन, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

आयकर अपील सं./ITA Nos.978 & 979/Chny/2015

निर्धारण वर्ष / Assessment Years : 2009-10 & 2010-11

Shri Uppu Karunasesh,
M/s PASS ASSOCIATES,
No.90, Armenian Street, 4th floor,
"Orient Chambers",
Chennai - 600 001.

v.

The Joint Commissioner of
Income Tax, Media Range,
The Deputy Commissioner of
Income Tax, Media Circle – I,
Chennai - 600 034.

PAN : AAHPK 8083 C

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से /Appellant by : Shri D. Anand, Advocate
प्रत्यर्थी की ओर से /Respondent by : Shri Asish Tripathi, JCIT

सुनवाई की तारीख/Date of Hearing : 02.02.2018

घोषणा की तारीख/Date of Pronouncement : 27.04.2018

आदेश / O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

Both the appeals of the assessee are directed against the common order passed by the Commissioner of Income Tax (Appeals) - 14, Chennai, dated 16.03.2015, for the assessment years 2009-10 and 2010-11. Therefore, we heard both the appeals together and disposing of the same by this common order.

2. The only issue arises for consideration in both the appeals is computation of income from house property.

3. Shri D. Anand, the Ld.counsel for the assessee, submitted that the assessee has let out two properties during the years under consideration. The first property is situated at Door No.10, Spurtank Road, Chennai-31. According to the Ld. counsel, the assessee received rental income of ₹98,21,750/-. The service tax paid by the assessee was to the extent of ₹2,31,750/-. According to the Ld. counsel, the assessee has taken the land on lease and constructed building, therefore, the lease rent paid for the land has to be reduced to the extent of ₹4,80,000/-. The balance amount available for the assessee is only ₹91,10,000/-. In respect of the property known as Karuna Enclave at Annanagar, Chennai-40, according to the Ld. counsel, the total rent adopted by the Assessing Officer was ₹2,72,57,210/-. According to the Ld. counsel, the assessee has paid service tax to the extent of ₹5,50,166/-. The lease rent paid to the land owner was ₹30,00,000/-. The assessee has also paid equipment hire charges to the extent of ₹21,25,000/- and the balance rent amount is ₹2,15,82,044/-. According to the Ld. counsel, this was offered for taxation by the assessee.

4. Referring to Section 24 of the Income-tax Act, 1961 (in short 'the Act'), the Ld.counsel for the assessee submitted that the land does not

belong to the assessee. The superstructure belongs to the assessee. The assessee received a composite rent for land and building. Therefore, according to the Ld. counsel, the rent received by the assessee in respect of land was diverted by overriding title to the landlord. Therefore, according to the Ld. counsel, the Assessing Officer is not justified in taking the rent which relates to land on which the superstructure was standing.

5. Shri D. Anand, the Ld.counsel for the assessee, further submitted that the third floor flat at No.10, Spurtank Road belongs to one M/s Sandesh & Sankalp Syndicates. The assessee, in fact, took the property from the above said landlord on monthly rent of ₹40,000/-. As per the rental agreement, the assessee was allowed to sub-lease the property. Accordingly, the assessee sub-let the property. Therefore, according to the Ld. counsel, the lease rent payable to the original owner, namely, M/s Sandesh & Sankalp Sundicates has to be reduced while computing income from house property under Section 24 of the Act.

6. Referring to Sections 22 and 23 of the Act, the Ld.counsel for the assessee submitted that for the purpose of determining annual rental value of the house property, the assessee shall be the owner of the property. Further, according to the Ld. counsel, Section 25B of the Act in categorical terms explains that the "owner of the property" means the

owner of the building or land appurtenant thereto. In this case, according to the Ld. counsel, the assessee is the owner of the superstructure in respect of the building at Annanagar. However, according to the Ld. counsel, in respect of flat at 10, Spurtank Road, the assessee is only lessee, therefore, the Assessing Officer is not justified in computing the capital gain. Referring to Section 26 of the Act, the Ld.counsel submitted that in respect of co-owners of the building and land appurtenant thereto, when the shares of co-owners are definite, the same shall not be assessed as Association of Persons. But, the respective share will be assessed in respect of co-owner. Referring to Section 27 of the Act, the Ld.counsel submitted that the term "ownership" as defined in Section 27 of the Act refers specifically the building and not the land thereto. A person acquires any right by way of lease from month to month or for a period not exceeding one year in respect of any building or part thereof, by virtue of Section 269UA of the Act, shall be deemed to be the owner of the building.

7. Referring to Section 53A of Transfer of Property Act, 1982, the Ld.counsel for the assessee submitted that in relation to immovable property, for the purpose of transfer, there should be a registered document. In this case, there was no registered document, therefore, there was no transfer at all. Placing reliance on the judgment of Apex Court in Balbir Singh Maini (398 ITR 531), the Ld.counsel submitted that

the assessable income from house property is only after reducing the lease rental for acquiring the sub-lease. At the best, according to the Ld. counsel, by virtue of Section 26 of the Act, the assessee can be considered as co-owner along with the owner of the land and the shares of ownership is definite, therefore, it has to be assessed as per the share. Hence, according to the Ld. counsel, the assessee has rightly declared the taxable income in respect of his right / share on the superstructure of the building.

8. Shri D. Anand, the Ld.counsel for the assessee, further submitted that as far as the land and other equipments are concerned, the assessee is not the owner, therefore, the rent portion which relates to land and other equipments shall be reduced from the total rent received by the assessee. Hence, according to the Ld. counsel, the Assessing Officer is not justified in computing the income from house property by disallowing the lease rental paid by the assessee towards the land and sub-lease of the building. The Ld.counsel has also placed his reliance on Section 17 of the Registration Act, 1908 and submitted that when the lease of immovable property was from year to year or for any term exceeding one year, the lease deed has to be compulsorily registered. In this case, according to the Ld. counsel, the lease deed is not registered, therefore, it cannot be construed as transfer of property within the meaning of Registration Act, 1908.

9. On the contrary, Shri Asish Tripathi, the Ld. Departmental Representative, submitted that the assessee's main source of income was from various properties as stated in the assessment order at pages 2 and 3. The assessee claimed before the Assessing Officer that he paid ₹4,25,000/- towards lease for the land, equipments such as lift, plant and other amenities. In respect of the property at Karuna Enclave, Annanagar, according to the Ld. D.R., the Assessing Officer found that the actual rent received by the assessee partakes the character of rent, therefore, it is assessable as such. According to the Ld. D.R., the lease amount said to be paid to the original landlord cannot be construed like taxes paid to the local authorities in respect of the property, therefore, that cannot be reduced while computing the income from house property as per Section 23 of the Act.

10. Referring to so-called equipments such as lift and other amenities, the Ld. D.R. pointed out that lift, air-conditioner, etc. are part of the building, therefore, the rent relating to lift, air-conditioner and other amenities cannot be reduced while computing income from house property. According to the Ld. D.R., the lift, air-conditioner and other amenities are inseparable from building, therefore, the rent relating to same cannot be bifurcated from the actual rent received by the assessee. Therefore, according to the Ld. D.R., the entire amount received by the

assessee for letting out property has to be assessed. At the best, the municipal tax, water tax paid by the assessee can be reduced. According to the Ld. D.R., the Parliament has allowed 30% statutory deduction in respect of the annual rent and also interest, if any, for acquiring the property. Apart from that, the assessee cannot claim any deduction while computing the income from house property. Therefore, according to the Ld. D.R., the CIT(Appeals) has rightly confirmed the order of the Assessing Officer.

11. We have considered the rival submissions on either side and perused the relevant material available on record. The dispute is, in computation of rental income from two house properties. The first property is at Annanagar known as Karuna Enclave and the other property is at No.10, Spurtank Road, Chennai. In respect of Karuna Enclave, the assessee has taken a piece of land on lease, on a monthly rental basis as per the lease agreement. The assessee has put up a superstructure / building and also let out the same. From the order of the CIT(Appeals) it appears that the assessee has constructed 56,656 sq.ft. of building and let out on monthly basis to M/s Office Tiger Database Systems India Pvt. Ltd. for a monthly rent of ₹22,25,587/-. In respect of the property at 10, Spurtank Road, the assessee claims that he has taken the land on lease for a monthly rent of ₹40,000/-. The assessee has also put up a construction and let out the same to M/s Cox and Kings

India Pvt. Ltd. and M/s Stratbiz Consulting Pvt. Ltd. While computing income from house property, the assessee has reduced the lease rental paid to land owners. The question arises for consideration is while computing income from house property under Sections 23 and 24 of the Act, can the assessee reduce the rent paid for the land, which was taken on lease for the purpose of constructing superstructure? We have carefully gone through the provisions of Sections 23 and 24 of the Act which read as follows:-

Section 23 of the Act

(1) For the purposes of section 22, the annual value of any property shall be deemed to be -

(a) the sum for which the property might reasonably be expected to let from year to year ; or

(b) where the property or any part of the property is let and the actual rent received or receivable by the owner in respect thereof is in excess of the sum referred to in clause (a), the amount so received or receivable ; or

(c) where the property or any part of the property is let and was vacant during the whole or any part of the previous year and owing to such vacancy the actual rent received or receivable by the owner in respect thereof is less than the sum referred to in clause (a), the amount so received or receivable :

Provided that the taxes levied by any local authority in respect of the property shall be deducted (irrespective of the previous year in which the liability to pay such taxes was incurred by the owner according to the method of accounting regularly employed by him) in determining the annual value of the property of that previous year in which such taxes are actually paid by him.

Explanation For the purposes of clause (b) or clause (c) of this sub-section, the amount of actual rent received or receivable by the owner shall not include,

subject to such rules as may be made in this behalf, the amount of rent which the owner cannot realise.

(2) Where the property consists of a house or part of a house which?

(a) is in the occupation of the owner for the purposes of his own residence ; or

(b) cannot actually be occupied by the owner by reason of the fact that owing to his employment, business or profession carried on at any other place, he has to reside at that other place in a building not belonging to him,

the annual value of such house or part of the house shall be taken to be nil.

(3) The provisions of sub-section (2) shall not apply if?

(a) the house or part of the house is actually let during the whole or any part of the previous year ; or

(b) any other benefit therefrom is derived by the owner.

(4) Where the property referred to in sub-section (2) consists of more than one house?

(a) the provisions of that sub-section shall apply only in respect of one of such houses, which the assessee may, at his option, specify in this behalf ;

(b) the annual value of the house or houses, other than the house in respect of which the assessee has exercised an option under clause (a), shall be determined under sub-section

Section 24 of the Act

Income chargeable under the head "Income from house property" shall be computed after making the following deductions, namely :

(a) a sum equal to thirty per cent. of the annual value ;

(b) where the property has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital :

Provided that in respect of property referred to in sub-section (2) of section 23, the amount of deduction shall not exceed thirty thousand rupees :

Provided further that where the property referred to in the first proviso is acquired or constructed with capital borrowed on or after the 1st day of April,

1999 and such acquisition or construction is completed within three years from the end of the financial year in which capital was borrowed, the amount of deduction under this clause shall not exceed two lakh rupees.

Explanation Where the property has been acquired or constructed with borrowed capital, the interest, if any, payable on such capital borrowed for the period prior to the previous year in which the property has been acquired or constructed, as reduced by any part thereof allowed as deduction under any other provision of this Act, shall be deducted under this clause in equal instalments for the said previous year and for each of the four immediately succeeding previous years.

Provided also that no deduction shall be made under the second proviso unless the assessee furnishes a certificate, from the person to whom any interest is payable on the capital borrowed, specifying the amount of interest payable by the assessee for the purpose of such acquisition or construction of the property, or, conversion of the whole or any part of the capital borrowed which remains to be repaid as a new loan.

Explanation For the purposes of this proviso, the expression "new loan" means the whole or any part of a loan taken by the assessee subsequent to the capital borrowed, for the purpose of repayment of such capital.

12. The term "annual value" is defined in Section 22 of the Act. As per Section 22 of the Act, the annual value of the property consists of any building or land appurtenant thereto of which the assessee is the owner. Section 27 of the Act defines "ownership". Section 27(iib) of the Act reads as follows:-

27 (iib) a person who acquires any rights (excluding any rights by way of a lease from month to month or for a period not exceeding one year) in or with respect to any building or part thereof, by virtue of any such transaction as is referred to in clause (f) of section 269UA, shall be deemed to be the owner of that building or part thereof ;

13. Therefore, wherever a right was acquired in respect of any building or part thereof by way of lease for a term not less than 12 years, it has to be construed as transfer. For the purpose of convenience, the provisions of Section 269UA(f) of the Act is reproduced hereunder:-

269UA (f) "transfer,"--

(i) in relation to any immovable property referred to in sub-clause (i) of clause (d), means transfer of such property by way of sale or exchange or lease for a term of not less than twelve years, and includes allowing the possession of such property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882).

Explanation For the purposes of this sub-clause, a lease which provides for the extension of the term thereof by a further term or terms shall be deemed to be a lease for a term of not less than twelve years, if the aggregate of the term for which such lease is to be granted and the further term or terms for which it can be so extended is not less than twelve years;

(ii) in relation to any immovable property of the nature referred to in sub-clause (ii) of clause (d), means the doing of anything (whether by way of admitting as a member of or by way of transfer of shares in a co-operative society or company or other association of persons or by way of any agreement or arrangement or in any other manner whatsoever) which has the effect of transferring or enabling the enjoyment of, such property.

14. We have carefully gone through the copy of the lease agreement in the light of the provisions of Section 269UA(f) of the Act, which is available at paper-book. The copy of the lease deed in respect of the property at Annanagar available at page 1 was for a period of ten years from 1st May, 2008 to 30th April, 2018. Similarly the lease deed available at page 15 also is for a period of ten years. A copy of the lease agreement available at page 133 in respect of the property at No.10,

Spurtank Road, Chennai, is for a period of six years commencing from 01.04.2008. Therefore, it is obvious that all the lease agreements of vacant land was less than 12 years as provided in Section 269UA(f) of the Act. Therefore, it cannot be construed as a transfer within the meaning of Section 27(iib) of the Act. Therefore, the assessee is not the owner of the land both in respect of Karuna Enclave and in respect of the property at 10, Spurtank Road. The question now arises for consideration is whether the lease rental paid by the assessee to the owner of the land is allowable as deduction while computing the income from house property? The genuineness of lease transaction is not in dispute. The lease rent paid by the assessee is also not in dispute. What is disputed by the Revenue is allowability of such lease rent paid by the assessee.

15. We have carefully gone through the provisions of Section 22 of the Act. The annual value to be computed is in respect of building and land appurtenant thereto for which the assessee is the owner. In this case, admittedly, the assessee is not the owner of the land. The building was put up by the assessee on the land belonging to other persons. Under the common law, double ownership in respect of building is permissible. In other words, under common law, land may belong to one person and building may belong to another person. Therefore, when the assessee took the land on lease and put up construction and let out the

building for lease, the lease rent paid or payable in respect of the land to the land owner has to be excluded while computing the annual value of the property. In respect of the lease, what was transferred to the assessee is a right to occupation and enjoyment on the land. The other rights relating to ownership continues to remain with the original owner. Therefore, the amount payable / paid as a lease rent for occupation and enjoyment of the land, which belongs to third party, has to be necessarily reduced while computing annual rental value under Sections 22 and 23 of the Act.

16. Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 provides for determination of annual rental value. In the absence of any method for computation of annual rental value in the Income-tax Act, this Tribunal is of the considered opinion that the method prescribed under Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 has to be adopted. The market value of the land and cost of construction of the building has to be estimated for the purpose of determining the annual rental value. In case, the assessee is not the owner of the land on which the superstructure was constructed, the market value of the land or the lease rent paid / payable for the land needs to be excluded. Therefore, this Tribunal is of the considered opinion that for computing the annual rental value of the building, the lease rental paid or payable by the assessee as per lease deed has to be excluded. The rent received or

receivable by the assessee for the building has to be reduced from the rent paid or payable by the assessee in respect of land to the land owners. Therefore, by any stretch of imagination, the rent paid or payable by the assessee in respect of land cannot form part of annual rental value or the actual rent received or receivable for the building. What is received or receivable by the assessee has to confine in respect of the ownership of the building since, admittedly, the land belongs to third party. Therefore, this Tribunal is of the considered opinion that the lease amount paid or payable to the landlord of the land has to be reduced while computing the annual rental value or income from house property under Section 22, 23 and 24 of the Act.

17. In view of the above, we are unable to uphold the orders of the authorities below. Accordingly, the orders of both the authorities below are set aside and the Assessing Officer is directed to recompute the rent received or receivable by the assessee after excluding the lease amount paid or payable by the assessee to the landlord / owner of the land.

18. In the result, both the appeals filed by the assessee are allowed.

Order pronounced on 27th April, 2018 at Chennai.

sd/-
(एस जयरामन)
(S. Jayaraman)
लेखा सदस्य/Accountant Member

sd/-
(एन.आर.एस. गणेशन)
(N.R.S. Ganesan)
न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,

दिनांक/Dated, the 27th April, 2018.

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. निर्धारिती /Assessee
2. Assessing Officer
3. आयकर आयुक्त (अपील)/CIT(A)-14, Chennai-34
4. CIT-10, Chennai
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.